

**Editor's note: Reconsideration denied by order dated March 31, 1975**

UNITED STATES  
v.  
PHYLLIS BIENICK AND HARRY BIENICK

IBLA 73-91

Decided January 31, 1974

Appeal from a decision by Administrative Law Judge 1/ Rudolph M. Steiner validating two of the mining claims contested in Sacramento contest S-4141.

Reversed as to portion of decision appealed.

Mining Claims: Discovery: Generally

Where the record discloses that a mining claim was located for rock or gravel after July 23, 1955, it must be shown that such material is an uncommon variety of rock or gravel and that there has been a discovery of a valuable mineral deposit.

Mining Claims: Determination of Validity--Mining Claims: Discovery:  
Marketability

Material which is suitable only for fill purposes, road base, or comparable uses is not locatable under the mining laws, and even if the material is suitable for other purposes, its sale for the above uses cannot be considered in determining its marketability.

APPEARANCES: Charles F. Lawrence, Esq., United States Department of Agriculture, San Francisco, California, for appellant; Russell F. Milham, Esq., Crescent City, California, for appellee.

---

1/ The title of "Hearing Examiner" has been changed to "Administrative Law Judge." 37 FR 16787 (1972).

## OPINION BY MR. GOSS

The Bureau of Land Management, on behalf of the Forest Service, United States Department of Agriculture, issued a complaint dated January 27, 1971, contesting the validity of eleven mining claims located in the Six Rivers National Forest, Del Norte County, California. 2/ The eleven claims in contest were never clearly identified as to location at the hearing held November 3 and 4, 1971, in Crescent City, California. Therefore, the Judge requested contestant and contestees to submit with their briefs an accurate plat showing the exact location of each claim. Contestees failed to comply with such request.

The Judge issued his decision on July 25, 1972. In validating two of the claims in contest he found that

\* \* \* the subject deposits of river rock on the Lost Horizon and Lost Horizon No. 1 claims were subject to location prior to 1955; that the demand therefor has been continuous since that date; and that the said deposits are valuable mineral deposits within the meaning of the mining laws.

2/ The claims in contest S-4141, as determined from the Exhibits are as follows:

<u>Claims</u>	<u>Type</u>	<u>Date of Location</u>	<u>Exhibit No.</u>
The Lost Horizon	(placer)	10/1/50	1
The Lost Horizon Group	(lode)	7/1/53	3
Lost Horizon No. 3	(lode)	7/1/53	6
Lost Horizon No. 1	(placer)	8/25/55	7
Lost Horizon No. 3	(placer)	4/22/65	9
Lost Horizon No. 2	(lode)	10/15/53	5

AMENDED:

Lost Horizon No. 2	(lode and	11/5/65	10
Quartz and Placer	placer)		
The Lost Horizon No. 2			
Group	(lode)	7/1/53	4

AMENDED:

Lost Horizon No. 2	(placer)	4/22/65	8
Lost Horizon No. 1,	(placer)	4/11/67	11
Quarry Rock, Rock			
in Place Placer			
Claim			
Lost Horizon No. 2	(lode and	4/11/67	12
Quarry Rock, Lode	placer)		
and Placer Claim			

Mrs. Bienick, the sole witness for contestee, testified that The Lost Horizon and Lost Horizon No. 1 claims, Exhibits 1 and 7, covered the same ground. (Tr. 149.) However, inspection of the descriptions on those two exhibits reveals that they do not cover the same areas. She also stated that The Lost Horizon and The Lost Horizon Group, Exhibits 1 and 3, were the same. (Tr. 150.)

It seems clear that the Lost Horizon No. 1 claim should not have been validated for "river rock" because Exhibit 7 states that the claim was not located until August 25, 1955, one month after "common varieties" of rock and gravel were withdrawn from location under the mining laws by the Act of July 23, 1955, 30 U.S.C. § 611 (1970). In order for rock or gravel from the Lost Horizon No. 1 claim to be locatable after July 23, 1955, it must be shown that such material is an uncommon variety of rock or gravel, see United States v. U.S. Minerals Development Corp., 75 I.D. 127 (1968), and for the claim to be valid a discovery must also be shown. United States v. Chas. Pfizer & Co., Inc., 76 I.D. 331, 336 (1969). No such showings were made in the present case.

The Government has only appealed that part of the decision which validated the Lost Horizon and Lost Horizon No. 1 claims. Contestees have not appealed. Therefore, the decision, as to the other claims in contest S-4141, is final.

The Government contends on appeal that:

(1) The quarry rock and gravel removed from the Lost Horizon and Lost Horizon No. 1 claims have been used principally as fill material or road subbase; these materials used in such low grade applications are not "minerals" within the meaning of the mining laws and, therefore, are not subject to location.

(2) Even if such materials may be considered mineral, they cannot be considered "valuable" within the meaning of the mining law, 30 U.S.C. § 22 (1970), because their only use has been for fill purposes.

(3) Even if such materials were locatable as common varieties under the Act of July 23, 1955, 30 U.S.C. § 611 (1970), and even if contestees had established a discovery prior to 1955, such discovery thereafter lapsed.

Evidently the gravel in the stream bed on the claims is valuable, if at all, only for its auriferous qualities, and it is to this gravel that Mrs. Bienick was referring when she testified "gravel has never been removed." (Tr. 155.) Her subsequent statements that "gravel isn't located at the creekbed; it's 20 feet

above" and "the gravel was removed from the Lost Horizon and the Lost Horizon Number 1" (Tr. 156) necessarily were in reference to "quarry rock." It is this material to which the Judge was apparently referring in his designation of "river rock" in the decision below.

Not all materials which can be removed from the earth and sold at a profit are locatable under the mining laws, 30 U.S.C. §§ 22 et seq. (1970). The Department has consistently held that materials suitable only for fill purposes, for road base or for comparable purposes are not locatable under the mining laws, and assuming such materials are suitable for other purposes, the sale of minerals for the above described uses cannot be considered in determining their marketability. United States v. Barrows, 76 I.D. 299, 306 (1969), judgment for United States aff'd. sub nom. Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Harenberg, 11 IBLA 153 (1973).

In the present case the Government's mining engineer, Emmett Ball, testified that all sales of gravel or quarry rock that he knew of came from the Lost Horizon claim. (Tr. 37.) The first group of sales beginning in 1953 (Exh. 25) consisted of a number of small sales totaling \$654.80 to Jim McNamara, a gravel hauler. These sales were made between July 24, 1953, and March 6, 1956. Of the total, \$171.50 represented sales after July 23, 1955, the effective date of the act which excluded from the coverage of the mining laws "common varieties" of sand, stone, and gravel. 30 U.S.C. § 611 (1970). Mrs. Bienick later testified that the price to McNamara had been 10 cents per yard. (Tr. 122.) The Government submitted written offer of proof that Ball had been informed by McNamara that the materials he purchased from the Bienicks "were suited for and used primarily as fill or sub-road base material." (Exh. 34; Tr. 97.)

Ball testified that Del Norte County bought 2,612 units of this material from the claimants in June 1962 at 10 cents per unit. The material was used for the repairing of a road near the claim. (Tr. 41.) The county also purchased 2,504 units at 15 cents per unit in October 1970. (Tr. 41.) William Hess, Del Norte County Director of Public Works, stated that the materials from the 1970 sale were used "primarily as fill materials, subbase materials for the structural section" of the Myrtle Creek Road (Tr. 99) because they "were conveniently available and suitable for the work." (Tr. 100.)

According to Ball the above were the only significant sales of gravel or quarry rock made by claimants other than occasional small sales like pickup loads used as a subbase (Tr. 40) or "on driveways, for a topping on driveways." (Tr. 43.)

Mrs. Bienick testified that the first sales from the claims were made "about 1952." (Tr. 120.) These were made to the Crescent City Highway Department for use in filling holes in a street. She stated that "the gravel hauled there was found to be superior for filling this boggy place because it had a cementing quality to it." (Tr. 120.)

In referring to a statement by Glenn Quimby (Attachment #1 to Exh. 36) in which he went "to get gravel" from the Bienicks prior to July 1955 (Tr. 123), Mrs. Bienick stated that "he filled the holes with this gravel." (Tr. 167.)

According to Mrs. Bienick, many more sales of gravel would have been made from the claims had the Forest Service not intervened and told potential buyers that they could possibly be held in trespass if they purchased materials from the Bienicks. (Tr. 125, 128, 157, 176.)

At page 7 in the decision below it is concluded that the materials involved herein were not fill:

Fill is native material, earth, gravel, or rock generally used to raise the level of a low place valued, and useful only for its bulk, and seldom transported very far from its original situs. The rock deposits on these claims meet local requirements for aggregate base. A substantial amount has been processed and transported for distances of more than ten miles. The subject rock, or gravel, appears to be a common variety of material which was subject to location under the mining laws prior to 1955.

William Hess, however, testified that material purchased by the county from the Bienicks in 1970 was used as fill or subbase because it was conveniently located and suitable. (Tr. 100.) The decision also states that the rock meets the "local requirements for aggregate base," an apparent reference to contestees' Exhibit A. <sup>3/</sup> Yet there is no evidence that the rock was used for any purpose other than as fill material, road subbase, or for driveway purposes.

---

<sup>3/</sup> Exhibit A is a letter from Walter Sweet, a civil engineer, to Harry Bienick dated October 21, 1971, stating that rock samples (unidentified as to a claim) meet the quality requirements for Aggregate Base, Classes 1 and 2, according to the Standard Specifications of the State of California, Division of Highways, January 1971, Edition.

Assuming that the material herein was a common variety mineral, in order to satisfy the requirements for discovery, it must be shown that the materials within the limits of the claims could have been extracted, removed and marketed at a profit as of July 23, 1955.

The test for discovery of a valuable mineral deposit was set forth in Castle v. Womble, 19 L.D. 455, 457 (1894), as follows:

[W]here minerals have been found and the evidence is of such a character that a person of ordinary prudence would be justified in the further expenditure of his labor and means, with a reasonable prospect of success, in developing a valuable mine, the requirements of the statute have been met.

Complementary to this prudent-man test is the so called marketability test as approved by the Supreme Court in United States v. Coleman, 390 U.S. 599 (1968). The Court said at 600:

The Secretary of the Interior held that to qualify as "valuable mineral deposits" under 30 U.S.C. § 22 it must be shown that the mineral can be "extracted, removed and marketed at a profit"--the so-called "marketability test."

The evidence as to contestee's sales prior to July 23, 1955, is limited to the list of sales made to Jim McNamara. (Exh. 25.) Although Mrs. Bienick testified that other sales were made (Tr. 132), no values are attributed to any such sales. Mrs. Bienick estimated total sales from the Lost Horizon claim as amounting to \$700 from 1953 to 1971 (Tr. 158), with about \$400 being prior to July 23, 1955. (Tr. 160.) Sales from the Lost Horizon No. 1 totalled about \$1,000 (Tr. 158), with removals of materials from that claim beginning in 1954. (Tr. 156.) Exhibit 7 shows that such claim was not located until August 25, 1955.

The evidence of sales on and prior to July 23, 1955, may be considered as supportive of a discovery if the material sold was not to be used as fill. See United States v. Barrows, *supra*. Even conceding the material herein may have been of better quality than fill, it was nevertheless used only for fill or comparable purposes. Any sales for such uses cannot be considered in determining the marketability of contestees' materials. Also as pointed out, *supra*, the Lost Horizon No. 1 claim was not located until after July 23, 1955; therefore, any evidence as to sales from such claim prior to that date is of no value in proving a discovery.

Regarding the alleged interference by the Forest Service, there is no indication of interference with any sales prior to 1955.

As to the small amounts of gold, the evidence does not show that a prudent person would be justified in expending labor and means in the expectation of developing a valuable mine. As to the sales of crystalline deposits, such specimens are valuable as natural curiosities but are not subject to location under the mining law. South Dakota Mining Co. v. McDonald, 30 L.D. 357 (1900).

We conclude that contestees had no discovery of a valuable mineral deposit on their claims on July 23, 1955, and for that reason the claims are null and void.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the portion of the decision appealed from is reversed.

---

Joseph W. Goss, Member

I concur:

---

Newton Frishberg, Chairman

MR. STUEBING CONCURRING:

While in substantial agreement with the rationale and the result reached in the main opinion, my own analysis of certain facets of the case requires further discussion.

The majority opinion quite correctly states that "not all materials which can be removed from the earth and sold at a profit are locatable under the mining law." Within the context of the mining law, the term "mineral" has never been construed to mean all substances which are not "animal" or "vegetable" in character. Such a division "would be absurd as applied to a grant of land, since all lands belong to the mineral kingdom." Northern Pacific Ry. Co. v. Soderberg, 188 U.S. 526, 530 (1903). There are numerous cases involving specific examples of materials which have been held to be not locatable under the general mining law. Among these are common brick clay, Dunluce Placer Mine, 6 L.D. 761 (1888); King v. Bradford, 31 L.D. 108 (1901); United States v. Matthey, 67 I.D. 63 (1960); United States v. Gunn, 7 IBLA 237, 79 I.D. 588 (1972); peat, peat moss or sedge peat, United States v. Lawrence, Civil No. 648-B (D. Calif., March 13, 1941); United States v. Toole, 224 F. Supp. 440 (1963); common or inferior limestone "for building of levees or railroad embankments or filling up low places," Holman v. Utah, 41 L.D. 314 (1912); Gray Trust Co. (On rehearing) 47 L.D. 18 (1919); stalactites, stalagmites, geodes, crystalline deposits and formations valuable as natural curiosities, South Dakota Mining Co. v. McDonald, 30 L.D. 357 (1900); minerals held in solution in springs and other waters (other than saline), Pagosa Springs, 1 L.D. 562 (1882); soil containing "trace elements" of minerals for use as agricultural additive; United States v. Toole, *supra*; "blow-sand" used for agricultural and horticultural purposes, Solicitor's Opinion M-36295 (August 1, 1955); United States v. Jaramillo, A-28533 (February 6, 1961); common rock for "filling purposes" Solicitor's Opinion M-36295, *supra*; Holman v. Utah, *supra*; clay used as mud for facial cosmetics, United States v. Springer, 8 IBLA 123 (1972); fine, flour-like earth having some of the properties of pumicite, but characterized as only "a type of dirt," United States v. Pulliam, 1 IBLA 143 (1970), *aff'd*, Pulliam v. United States, Civil No. 71-649 (D. Ariz. filed April 13, 1973); clay sold for use as an additive to cattle feed but not distinguishable from common clay, United States v. O'Callaghan, 8 IBLA 324 79 I.D. 689 (1972); a "mine" deriving revenue only through paid admission of persons desiring to breathe radon gas released by decaying uranium and said to have therapeutic value, United States v. Elkhorn Mining Co., 2 IBLA 383 (1971), *aff'd*, Elkhorn Mining Co. v. Morton, Civil No. 2111 (D. Mont., filed January 19, 1973); sandstone used as fill for roads, United States v. Black, 64 I.D. 93, 96 (1957).

It is the purpose of the mining laws to reserve from disposition and to devote to mineral sale and exploitation only such lands as

possess mineral deposits of special or peculiar value in trade, commerce, manufacture, science, or the arts. Stanislaus Electric Power Co. 41 L.D. 655 (1913).

Having established that certain products of the earth have never been regarded as subject to location under the mining law, despite their marketability at a profit, we reiterate that among these nonlocatables are materials used for fill, grade, ballast and base. United States v. Harenberg, 11 IBLA 153 (1973); United States v. Barrows 76 I.D. 299 (1969), *aff'd*, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Brewer, A-27908 (December 29, 1959); United States v. Proctor, A-27899 (May 4, 1959). We must note, however, that there was an exception to this broad, general rule. Certain types of ballast and base for road beds, railroads, airport runways, foundations for large buildings, bridges and other structures were often treated as mineral subject to location prior to July 23, 1955. The criterion for distinguishing between two types of base material, for example, was whether the material demanded had to meet established engineering specifications for the particular use. "Specification material" was treated as locatable, on the theory that inferior grades would not serve. See United States v. Matthey, *supra*; Stephen E. Day, Jr., 50 L.D. 489 (1924). Nevertheless, even where the material was previously regarded as a mineral subject to location because it met engineering requirements for compaction, hardness, soundness, stability, favorable gradation, non-reactivity and non-hydrophilic qualities in road building and similar work, after July 23, 1955, these materials were treated as common varieties, and therefore not locatable, because materials which meet these standards are common, abundant and of widespread occurrence. United States v. Cardwell, A-29819 (March 11, 1964); United States v. Hensler, A-29973 (May 14, 1964); United States v. Basich, A-30017 (September 23, 1964).

Therefore, the first issue to be decided in this case is whether, prior to July 23, 1955, the deposits were "valuable" only as common fill, ballast, sub-base or base material. If so, those deposits were not subject to location, notwithstanding the fact that a profit might have been made from the extraction and sale of the material for that purpose.

As noted in the main opinion, the Judge's finding that the rock and/or gravel deposits on these claims was locatable as a common variety prior to the 1955 amendment seems to be premised on the fact that some of it was hauled more than 10 miles for use. I am unable to attach such critical significance to that fact. Much more compelling, in my opinion, is the evidence of what was done with the material after

it was delivered. In this context, the following summary of the evidence, excerpted from appellant's statement of reasons for appeal, is illuminating:

1) From July 24, 1953, to March 6, 1956, [Mrs. Bienick] sold \$654.80 worth of gravel to Mr. McNamara, at 10 cents per yard. 4833 yards were sold before July 23, 1955; 1715 yards afterwards.

These are the sales detailed by Mr. McNamara in Exhibit 25 \* \* \*. They are referred to again in a letter (Ex. 36) Mrs. Bienick wrote to the Forest Service supervisor, where she describes them as "the one big test being on A. Street, Crescent City"; attached to this letter is Mr. McNamara's statement confirming that 4833 yards were removed through June 6, 1955. This "one big test," according to her testimony (Tr. 120), was in "filling this boggy place," as noted above. These same McNamara sales are thereafter adverted to repetitively as "a market established for the gravel before '55" (Tr. 121); in "an affidavit from Mr. McNamara dated September the 8th, 1966" (Tr. 121); as a sale of "approximately 5,000 yards before the new law went into effect" (Tr. 121-122); as "4883 yards" (Tr. 122); as "4800" yards (Tr. 123); as gravel which "we started selling in 1953" (Tr. 128; 131); as gravel sold before '55 (Tr. 175).

Included in these sales are some in which Mr. McNamara sold the material "to people that wanted gravel for driveway uses" (Tr. 168).

2) Sales to Mr. Quimby are mentioned. (Tr. 123). According to Mr. Quimby (Memorandum of April 4, 1968, attached to Exhibit 36) some "4-5 tons were involved," and were used "to patch holes on the 300 yard driveway." He is mentioned again (Tr. 132), and his use of the gravel given in more detail (Tr. 166-167): "It rains a lot in our area and the holes are deep and muddy, and he filled the holes with this gravel"; "he used it, to take care of these mud conditions, for fill" (Tr. 167).

3) A Mr. Hill is mentioned, but what if anything, was purchased by him is not stated. He

may have used it on his driveway (Tr. 123-124, Ex. 36). Apparently he helped build a road on the claims (Tr. 154-155).

4) Oscar Christensen is named. He seemingly bought about 90 tons of gravel beginning in 1953 (Tr. 132; Ex. 36), and "used it for driveways" (Tr. 168).

5) A Mr. Cronin with the Highway Department is named. Apparently he was interested "in the holes on A. Street" where "it was real boggy" (Tr. 120).

6) Mr. and Mrs. Wilson are named (Ex. 36). They bought we "don't know much much" gravel "just for their driveway" (Tr. 124). They are mentioned again (Tr. 132, 167) as having used it as did Mr. Quimby, i.e., to fill holes in the ground.

7) Shirley Campbell's name is used (Tr. 124), again (Tr. 131-132), and again (Tr. 164), and again (Tr. 168), and again (Tr. 231). He assertedly used an unstated quantity for an unknown purpose (Tr. 168). His own statement (Ex. 36) is that he merely hauled it for McNamara, from the Lost Horizon No. 1.

8) Hugh Nail, the County Road Engineer, "knew of the Bienicks' gravel pit in 1954 and knew it was good gravel for road material, and later purchased gravel for the County road from the Bienick claims" (Tr. 124-125; Ex. 36). Apparently about \$300 worth was purchased, sometime around 1955, at 25 cents per yard (Tr. 124-125; 143; 163-164; 167-168) or perhaps at 15 cents (Tr. 230).

9) Also mentioned repetitively were Mr. Regan (Tr. 125, 164, 176), Mr. Kipp (Tr. 126, 176), and Mr. Russell (Tr. 176) of the State Highway Department, who allegedly would have made purchases had the Forest Service been less dissuasive.

10) A number of other small sales, commonly of pickup-truck loads, perhaps 50, were purchased at unstated times, at \$1 per load (Tr. 126, 128, 132, 162, 163, 169).

11) In 1967 seemingly \$550 in sales were made, including possibly, other materials than gravel (Tr. 161-162), but possibly solely for "gravel trucks" (Tr. 177).

12) In 1970 the Bienicks sold "approximately 3,000 yards to the County" (Tr. 176) which, according to County Public Works Director Hess (Tr. 99), was used as fill. (This is the 2,504 yard sale at 15 cents per yard, as reported by Mr. Ball - Tr. 41.)

13) According to Mrs. Bienick, had the Forest Service not attempted to dissuade potential buyers--most notably County and State Highway officials--she could have sold much more (Tr. 125, 126, 128, 129, 130, 157, 175, 176, 177).

14) As it was, she estimated her total sales off the Lost Horizon as amounting to \$700.00 (Tr. 158), of which about \$400.00, or slightly more than one-half, were before 1955 (Tr. 160); and to about \$1,000.00 (Tr. 158) off the Lost Horizon No. 1. Removals commenced off the Lost Horizon No. 1 in 1954 (Tr. 156) and, after 1955, the greater part of the removals were off that claim (Tr. 162-163).

Mrs. Bienick also testified that "we have a lot of large boulders on our creek that can be used for . . . the side of the road just to keep the road from falling down." (Tr. 209). This apparently refers to the prevention of erosion of roadbeds and shoulders.

Emmett B. Ball, Jr., a mining engineer employed by the Forest Service, testified that the material used on A Street in Crescent City was not used as a paving base, but rather that "it was used as fill, like a subbase." (Tr. 40).

William Hess, Director of Public Works for the County of Del Norte, testified that the county had used the material from the claims in the reconstruction of Myrtle Creek Road "primarily as fill materials, subbase materials for the structural section of the road," that these materials were the uses which the county had found the material most fit for, and that he knew of no other uses. He further stated that the county purchased the materials because they were conveniently available and suited to the work. He explained, "[T]hey were used as subbase material to build up soft spots in the road in

preparation for placing the actual road structural section." (Tr. 99, 100). On cross-examination Hess was asked who made the tests to determine if the material was suitable for the work, and he replied:

You're getting involved in selection of materials and the use those materials are available for. Sometimes tests are not needed depending on how the material is to be used. In this case, tests were not needed; so we did not test the material. (Tr. 101).

From this resume of the evidence it might very easily be concluded that the material in question is useful and "valuable" only as fill, or at least that it had no other significant market value prior to July 23, 1955. If that view be correct, the claims are null and void for the reason that common fill was never locatable and common varieties of mineral were not subject to location after that date.

We must not, however, ignore the report of Walker B. Sweet, a civil engineer, who tested rock samples from one or more of the claims (the claim[s] not being identified), and found them to meet California Highway Division standards for "Aggregate Base, Classes 1 and 2." (Ex. A). The report states that the tests were conducted on October 20, 1971. Nothing in the record indicates that the material was known to be capable of meeting state specifications, or any other engineering specifications, prior to that date. Therefore, we cannot hold that a discovery of specification grade material was made on the claims prior to July 23, 1955.

Even were we to assume that the material was known to have the qualities which made it particularly suited to the special structural requirements of certain types of construction, unless there was a profitable market for the material as such prior to July 23, 1955, it could not be regarded as a valuable deposit of locatable mineral. Where the evidence shows that up to that date substantial amounts of material had been sold only for fill, road base, or other such purposes, those sales cannot be considered in determining the marketability of the material on the claims. United States v. Barrows, 76 I.D. 299 (1969), aff'd, Barrows v. Hickel, 447 F.2d 80 (9th Cir. 1971); United States v. Hinde, A-30634 (July 9, 1968).

Accordingly, the quarried rock, or gravel, from these claims cannot be treated as a "valuable mineral deposit" within the context of 30 U.S.C. § 22 (1970), because either the deposit was not a locatable mineral initially, or alternatively, because no recognizable mineral market was shown to exist prior to July 23, 1955.

As to the other minerals, the record shows that gold has not been discovered in such quantity as would justify a prudent person to further expend his labor and means in the reasonable expectation that he could develop a valuable gold mine. Placer mining efforts by the claimants have yielded some small amounts of gold, but not nearly enough to sustain the operation on the basis of the market value of the gold recovered. Rather than sell the miniscule amounts of recovered gold on the gold market, claimants set individual small nuggets or flakes in clear plastic, such as lucite, for sale to tourists through rock shops. (Tr. 139).

Mrs. Bienick also testified that the claims contain mineral fragments which, in the opinion of many, are meteorites. As noted in the main opinion, the contestant's expert, Ball, disagrees. Mrs. Bienick stated that their main utility is for sale in rock shops. (Tr. 142, 147).

The magnetite crystals have no established utility except for sale to interested collectors, although a Mr. McKenna of Chicago has been experimenting with them to determine their suitability for use in a wide range of applications, including atomic science, dial assembly switches, space technology, pollution control, and relief from cancer. (Tr. 133, 209). Twelve years prior to the hearing the claimants had advertised these crystals for sale for three months in the publication *Gems and Minerals*, which resulted in a number of sales. (Tr. 212). They also sold \$30 worth at a rock show, or fair, in San Francisco, and have sold others to a number of rock shops for resale. (Tr. 216). The total of all such sales amounted to about \$300. (Tr. 188).

As previously indicated, crystalline deposits and formations valuable not as mineral but as natural curiosities, or specimens, are not subject to location under the mining law. South Dakota Mining Co., v. McDonald, supra.

Member Goss correctly notes that the notice of location of the Lost Horizon No. 1 claim states quite definitely that the claim was located on August 25, 1955, and that this, in itself, is a sufficient basis for declaring it to be null and void. However, Mrs. Bienick testified that all three "quarry rock" claims were located in 1953, specifically naming the Lost Horizon No. 1. (Tr. 113). It may fairly be assumed that there is either an error in her testimony or in the location notice. The evidence seems to bear out the fact that the Bienicks were in fact on the ground and operating prior to 1955, and we must take notice of the fact that no federal statute requires recordation at any particular time. I only raise this question to

make the observation that regardless of whether the claim was located before or after July 23, 1955, it does not alter the case. For the reasons stated above, the claims are null and void, and the decision below is properly reversed.

---

Edward W. Stuebing, Member

